

# **Submission**

on the

## **Commonwealth Commissioner for Children and Young People Bill 2010**

to the

### **Senate Legal and Constitutional Affairs Committee**

Department of the Senate

Parliament House

PO Box 6100 Canberra ACT 2600

Telephone: 02 6277 3560

Facsimile: 02 6277 5794

Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Website: [www.aph.gov.au/senate/committee/legcon\\_ctte](http://www.aph.gov.au/senate/committee/legcon_ctte)

by

### **FamilyVoice Australia**

4<sup>th</sup> Floor, 68 Grenfell St, Adelaide SA 5000

Telephone: 1300 365 965

Facsimile: 08 8223 5850

Email: [office@fava.org.au](mailto:office@fava.org.au)

Website: [www.fava.org.au](http://www.fava.org.au)

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## 1. Introduction

On 26 October 2010 the Senate referred the *Commonwealth Commissioner for Children and Young People Bill 2010* to the Senate Legal and Constitutional Affairs Committee for inquiry and report.

This private Senator's bill seeks to establish an independent statutory office of Commonwealth Commissioner for Children and Young People that would be empowered to advocate at a national level for the needs, rights and views of people below the age of eighteen.

Submissions from the public have been invited and should be received by 15 December 2010. The committee is due to report by 12 May 2011.

## 2. Children, the family and the Convention on the Rights of the Child

The Bill would acknowledge among its underlying principles that:

*the family has the primary responsibility for the upbringing and development of its children and should be supported in that role.*<sup>1</sup>

The Bill would provide that the proposed Commissioner for Children and Young People should in performing the functions of the Commissioner, among other things:

*consult with parents and guardians of children and young people.*<sup>2</sup>

However, overall the approach of the Bill, reflecting the Convention on the Rights of the Child, is to treat children as autonomous individuals detached from the families in which they live.

### 2.1 Children welcome here

The Commissioner would be required to:

*(a) consult with children and young people in ways appropriate to their age and maturity; and*

*(b) listen to and seriously consider the concerns, views and wishes of children and young people; and*

*(c) adopt work practices that ensure the Office of the Commissioner is accessible to children and young people and encourages their participation.*<sup>3</sup>

Many parents would find it odd, perhaps even disturbing, that a government body would be seeking to engage so directly with children and encouraging them, for example, to attend the Office of the Commissioner unaccompanied by their parents.

### 2.2 Convention on the Rights of the Child

The Commissioner would be empowered to promote “*the rights of all children and young people nationally, to meet Australia’s international obligations*”.<sup>4</sup>

Indeed one of the objects of the Bill would be for the Commissioner “*to assist Australia in meeting its international obligations under the United Nations Convention on the Rights of the Child.*”<sup>5</sup>

The Committee on the Rights of the Child 2005 “*Concluding observations: Australia*” among other findings objected to the laws in various Australian States and territories that permit parents to use corporal punishment for the purpose of “reasonable chastisement”. The Committee formally called on Australia to “*take appropriate measures to prohibit corporal punishment at home.*”

Many Australian families use reasonable physical discipline from time to time. There is a significant body of research confirming its utility in raising children well.<sup>6</sup>

It is one thing for there to be an internal domestic debate within each State and territory on the merits or otherwise of banning the use of corporal punishment within the home. It is quite another thing to have an international committee seeking to interfere in the laws of our States and territories on a matter such as this. Empowering a Commissioner for Children and Young People as a species of local enforcer of this international committee would not be helpful and is unwarranted.

During the debate in 1990 on whether Australia should ratify the Convention on the Rights of the Child its proponents pilloried pro-family groups that asserted that the Convention undermined parental rights.

However, the official view was made clear in the 1995 “*Concluding Observations Concluding observations of the Committee on the Rights of the Child: Holy See*”. The Committee took the Holy See to task over its formal reservation to Article 5 and Articles 12 through 16 of the Convention in which the Holy See states that it will interpret these articles in accordance with parents’ inalienable rights and prerogatives. The Committee stated that it was “*concerned about [these] reservations ... in particular with respect to the full recognition of the child as a subject of rights... In this respect, it wishes to recall its view that the rights and prerogatives of parents may not undermine the rights of the child as recognized by the Convention, especially the right of the child to express his or her own views and that his or her own views be given due weight.*”<sup>7</sup>

## **2.3 A charter for child autonomy?**

Article 5 of the Convention states that:

*States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*

This phrase effectively limits the obligations of States Parties to respect parental rights only when parents are considered by the State to be acting “*in a manner consistent with the evolving capacities of the child*”.

By empowering a Commissioner for Children and Young People to promote “*the rights of all children and young people nationally, to meet Australia’s international obligations*” the Bill would potentially create a powerful government body that could act to undermine parental efforts to supervise the upbringing of their own children according to their best judgement.

The autonomy model of children’s rights is further expressed in Articles 12 through 16 of the Convention which require States Parties to recognize children’s rights to:

- have their views expressed and taken into account in all matters concerning them (Article 12).

The weight to be given to these views is to be in accordance with the age and maturity of the child. While 12.2 deals with judicial and administrative proceedings, article 12.1 is unlimited in application. It could be held to require parents and educational authorities to give more weight to a child's views than they might otherwise do.

- freedom of expression, including seeking and receiving information through any media (Article 13).

The only limitation is by the laws usually considered necessary to place limits on freedom of expression. This Article could be applied to prevent parents from effectively controlling information available to their children.

- freedom of thought, conscience and religion (Article 14).

Under this article parental supervisory rights must only be respected by the State when exercised in a manner consistent with the evolving capacities of the child. In other words, children have a right to freedom of thought, conscience and religion to be exercised independently of their parents direction with the full legal protection of the State whenever the child is judged to have the capacity to do so.

- freedom of association and peaceful assembly (Article 15)

This freedom is only to be limited by the usual limits permitted to restrict these rights for adults (e.g. protection of public order). This Article could also be cited to prevent parents from effectively supervising their children's relationships with others.

- freedom from arbitrary interference with privacy (Article 16).

Privacy rights are used to ground alleged rights to sexual activity, access to contraception and abortion. This Article could be held to endorse children's rights to such things without parental knowledge or supervision whenever the child is judged to have the capacity to exercise these "rights" independently.

In each of these Articles children are said to possess autonomous rights. Either through Article 5 or through explicit statements in these Articles, parental supervisory rights are to be exercised only in a manner consistent with the evolving capacity of the child.

This represents a decisive move away from age-based criteria for minority status to capacity-based criteria. The obvious difficulty with this is that once it is held to be an obligation under international law (as opposed to simply being expressed as a suggestion for how parents ought to fulfil their supervisory responsibilities) is that someone must make judgements as to:

- the current capacity of the child to exercise a particular right independent from parental supervision;
- the extent to which parental action infringes the child's valid, autonomous exercise of a right; and
- any remedy necessary to enforce or uphold the child's rights and to restrain the parents from infringing those rights.

The Bill would empower the proposed Commissioner for Children and Young People to make these decisions. What reason do we have for thinking that the Commissioner would have the child's best interests at heart more than the child's parents or, in fact, be more capable of judging the child's evolving capacities better than the parents?

***Recommendation 1:***

***The Bill would empower the Commissioner for Children and Young People to treat children as autonomous individuals detached from the families in which they live. It could lead to a significant undermining of parental rights and responsibilities.***

***The Bill should be opposed.***

### **3. Additional concerns**

#### **3.1 Definition of “children and young people”**

The Commissioner would be given various powers in relation to all “*children and young people*”.

The definitions clause of the Bill defines the terms “child” and “children and young people” as follows:

***child***, used in relation to the United Nations Convention on the Rights of the Child, means a person below the age of 18 years.

***children and young people*** includes all people below the age of 18 years.<sup>8</sup>

It seems that the term “children and young people” could be interpreted to include some people who are not below the age of 18 years. It is not clear who might be included. This is unsatisfactory in a definition of a key term in a Bill that would give significant powers to the proposed Commissioner.

***Recommendation 2:***

***If the Bill proceeds it should be amended to ensure that the Commissioner has no powers relating to young persons aged 18 years or more.***

#### **3.2 Centralisation**

The Bill would give powers to the Commissioner to interfere in matters which are clearly the responsibility of the States.

For example the Commissioner would be empowered to “*monitor the development and application of laws affecting children and young people*” and seek to advance “*the status of children and young people in Australia, including Indigenous children and young people and other groups identified as being at risk, by reviewing existing laws.*”<sup>9</sup> In neither case are the “laws” in question limited to laws of the Commonwealth.

The Commissioner would be empowered to co-ordinate “*policies, programs and funding which impact on children and young people, between federal, state, territory and local governments*”.<sup>10</sup> Has anyone asked the States if they want a Commonwealth commissioner to be performing such a role?

***Recommendation 3:***

***If the Bill proceeds it should be redrafted to limit the powers of the Commissioner to matters of direct Commonwealth responsibility and avoid any encroachment on the responsibilities of the States.***

### 3.3 Legal guardian

The Bill would seek to make the Commissioner for Children and Young People in appropriate cases, acting as “*the legal guardian of unaccompanied children and young people who arrive in Australia without the requisite visa or other authority for entry into Australia*”.<sup>11</sup>

This provision would directly conflict with Section 6 of the *Immigration (Guardianship of Children) Act 1946* which provides that:

*The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.*

The mover of the Bill seems to have overlooked this conflict as there is no provision in the Bill for amending the *Immigration (Guardianship of Children) Act 1946* to deprive the Minister of legal guardianship of children in the cases where the Bill proposes making the Commissioner for Children and Young People the legal guardian. Neither the second reading speech by the mover nor the explanatory memorandum shed any light on the rationale for making the Commissioner the legal guardian rather than the Minister.

## 4. Endnotes

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1. Clause 4 item (b).
2. Clause 10 item (d).
3. Clause 10 items (a)-(c).
4. Clause 9(1)(b).
5. Clause 3(3).
6. Larzelere, R. E., & Kuhn, B. R. (2005), “Comparing child outcomes of physical punishment and alternative disciplinary tactics: A meta-analysis”, *Clinical Child and Family Psychology Review*, 8 (1), 1-37; <http://www.springerlink.com/content/k0x4468k255187qg/>
7. <http://www.unhcr.org/refworld/pdfid/3ae6aec910.pdf>, paras 7 and 13.
8. Clause 5(1).
9. Clauses 9(c)(i) and 3(2)(b).
10. Clause 9(1)(i).
11. Clause 9(1)(e).